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4. Taxation (§ 493 (1*))—Error in Assessment—Correction by Circuit Court.—If any error to the prejudice of the trustee was committed when the commissioner of revenue assessed a trust fund on information derived from the examiner of records instead of on inquiry of the taxpayer, the assessment being to the trustee at the residence of the life tenant, the trustee had opportunity to have the error corrected by the circuit court, which had power to do all the commissioner of revenue had power or was required to do in the premises under the tax laws.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 105.]

5. Appeal and Error (§ 671 (4*))—Bill of Exception—Showing of Evidence—Res Judicata.—Plaintiff's bill of exception, stating that, after certain evidence had been introduced, plaintiff moved to be exonerated from payment of taxes on the ground the court had already passed on the question in a controversy about previous taxes, and had determined that the trust funds involved were not subject to taxation in Virginia, so that the question then presented was *res judicata*, but that the court overruled the motion and refused the relief sought, did not show that there was any evidence in the record to support the ground of *res judicata* alleged, and no question of *res judicata* can arise.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 538; 5 Va.-W. Va. Enc. Dig. 386.]

Error to Circuit Court of James City and City of Williamsburg.

Motions to correct erroneous assessments of taxes on intangible personal property by Henry A. Wise, trustee, and another, against the Commonwealth of Virginia, and another. To review judgments denying the applications and dismissing the motions, applicants bring error. Affirmed.

Henley, Hall & Hall, of Williamsburg, for plaintiffs in error.

J. D. Hank, Jr., *Atty. Gen.*, *O. L. Shewmake*, *Asst. Atty. Gen.*, and *Frank Armistead*, of Williamsburg, for defendants in error.

TORBERT *v.* ATLANTIC COAST LINE R. CO.

March 28, 1918.

[95 S. E. 635.]

1. Railroads (§ 481 (1*))—Fire Near Track—Evidence.—In an action against a railroad for setting fire to plaintiff's property, testi-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

mony of plaintiff was admissible that engines drawing freight trains southward threw sparks and coals as they passed his property.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 134.]

2. Appeal and Error (§ 1056 (1)*)—Prejudicial Error—Exclusion of Evidence.—The exclusion of such testimony was prejudicial.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 595.]

3. Trial (§ 194 (1)*)—Instruction—Weight of Evidence.—An instruction on the weight and effect of the evidence must be carefully drawn, so as not to invade the jury's province.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 734.]

4. Appeal and Error (§ 1064 (1)*)—Trial—Setting Fire—Instruction—Sufficiency of Evidence.—In an action against a railroad for setting fire to plaintiff's property by its right of way, an instruction that the jury could not presume from the happening of the fire that it was caused by the railroad, in other words, that it was incumbent on plaintiff to show how the fire occurred, and plaintiff could not leave to the jury the determination of the question by conjecture, guess, or random judgment, or upon mere supposition, was erroneous and prejudicial to plaintiff as an instruction that the jury could not presume, from the happening of the fire under the circumstances shown by the evidence for plaintiff, that it was caused by the railroad.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 600.]

Error to Circuit Court, Norfolk County.

Action by N. T. Torbert against the Atlantic Coast Line Railroad Company. To review a judgment for defendant, plaintiff brings error. Reversed.

Rumble & Campe, of Norfolk, for plaintiff in error.

William B. McIlwaine and *Bernard Mann*, both of Petersburg, and *Williams, Tunstall & Thom*, of Norfolk, for defendant in error.

BROOKLYN TRUST CO. et al. v. BOOKER, Revenue Com'r.

March 28, 1918.

[95 S. E. 664.]

Taxation (§ 98*)—Choses in Action—Nonresident Trustee.—Where a citizen of Virginia residing in the state has a life estate in choses in action held in trust for him by a nonresident trustee, the state of Virginia can levy a tax on the fund, though the choses in action are not and never have been within Virginia and the trustee has always been a nonresident.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 101.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.